

2003

Glenda Giles v. Utah Labor Commission, Oakridge Country Club and/or Workers' Compensation Fund; Wasatch Crest Mutual Ins. Co.; Wasatch Crest Mutual Ins. Co.; Employer's Reinsurance Fund; Adecco, f/k/a Tad Technical Services Corp., and/or Liberty Mutual Ins. Co.; Constitution State Service Co.; Ace USA/Pacific Employer's Ins. Co.; Transportation Ins. Co.; and International Revenue Service : Brief of Appellee

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IN THE UTAH COURT OF APPEALS

GLENDA GILES,	:	
	:	Court of Appeals
Petitioner/Appellant,	:	
	:	Case No.: 20030577-CA
vs.	:	
	:	Priority 7
UTAH LABOR COMMISSION, OAKRIDGE	:	
COUNTRY CLUB and/or WORKERS'	:	
COMPENSATION FUND; WASATCH CREST	:	
MUTUAL INS. CO.; EMPLOYER'S	:	
REINSURANCE FUND; ADECCO, f/k/a	:	Labor Commission No.: 20001228
TAD TECHNICAL SERVICES CORP.,	:	
and/or LIBERTY MUTUAL INS. CO.;	:	
CONSTITUTION STATE SERVICE CO.;	:	Appeal from the Utah Labor
ACE USA/PACIFIC EMPLOYER'S INS.	:	Commission
CO.;TRANSPORTATION INS. CO.; and	:	
INTERNATIONAL REVENUE SERVICE.	:	
Respondents/Appellees.	:	

BRIEF OF APPELLEE TAD TECHNICAL CORP. and/or LIBERTY MUTUAL

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JURISDICTION OF THE COURT OF APPEALS

This Petition for Review by Appellant is from a final order of the Labor Commission of Utah dated July 16, 2003, Order Denying Motion for Reconsideration, and encompasses the Labor Commission's Order Denying Motion for Review, dated May 1, 2003. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 34A-2-801(8)(a), 63-46b-16, and 78-2a-3(2)(a).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue: Whether the Commission properly found that Ms. Giles failed to meet her burden of establishing, by a preponderance of evidence, that she is entitled to worker's compensation benefits under the applicable Occupational Disease Act as a result of her work with TAD during the period of September 1985 to October 1990. This issue was preserved at R. 345-70 and throughout record.

Standard of Review: This matter involves the Commission's determination of medical causation which is an issue of fact which appellate courts will review under the "substantial evidence standard". See Chase v. Industrial Comm'n, 872 P.2d 475 (Utah Ct. App. 1994); Utah Code Ann. §§63-46b-16(4)(g) (2004). Substantial evidence is "such relevant evidence

as a reasonable mind might accept as adequate to support a conclusion.” The appellate court will sustain the Commission's factual determination concerning medical causation only if its finding is adequately supported by the record. See id.

DETERMINATIVE LAW

The relevant statute at issue in Ms. Giles’ claim against TAD is the 1990 version of the Last Employer Liable Rule, Utah Code Ann. § 35-2-14 (1990) which provides in relevant part:

Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of such disease
.....

Utah Code Ann. § 35-2-14 (1990).¹

¹ Unlike the general rule in Utah – where courts apply the substantive law in effect when the action was initiated (i.e., the date the claim was filed), – the proper law to be applied in workers’ compensation matters is the law “as it existed at the time of the injury.” Marshall v. Industrial Comm’n, 704 P.2d 581 (Utah 1985); Smith v. Mity Lite, 939 P.2d 684, n.1 (Utah Ct. App. 1997) (courts must apply “the law at the time of the initial injury”). Although Utah’s appellate courts have not specifically articulated this rule in the context of occupational diseases, the same premise should apply. That is, in occupational disease claims, the Commission must apply the law in effect when the worker was injured, or in occupational disease terms, when the worker suffered an “injurious exposure” to the disease-causing agent(s).

For Ms. Giles to successfully prevail against TAD, she must show an injurious exposure during the course of her employment with TAD. Accordingly, she must show that her injurious exposure occurred sometime between September 1985 and October 1990, the dates during which she

Moreover, Utah Code Ann. § 35-2-27 (1990), defines the requirement for proof of an occupational diseases as follows:

For the purpose of this act only the diseases enumerated in this section shall be deemed to be occupational diseases:

...

(28) Such other diseases or injuries to health which directly arise as a natural incident of the exposure occasioned by the employment, provided however, that such a disease or injury to health shall be compensable only in those instances where it is shown by the employee or his dependents that all of the follow named circumstances were present: (1) a direct causal connection between the conditions under which the work is performed and the disease or injury to health; (2) the disease or injury to health can be seen to have followed as a natural incident fo the work as a result of the exposure occasioned by the employment; (3) the disease or injury to health can be fairly traced to the employment as to the proximate cause; (4) the disease or injury to health is not of a character to which the employee may have had substantial exposure outside of the employment; (5) the disease or injury to health is incidental to the character fo the business and not independent of the relation of the employer and employee; and (6) the disease or injury to health must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before discovery. No disease or injury to health shall be found compensable where it is of a character to which the general public is commonly exposed.

Id.

was employed by TAD. Since she was not employed with in 1991, that statute does not apply in her claims against TAD.

The ALJ's Order incorrectly lists the 1991 version of this statute.² See R., 343.

With regard to medical causation, Utah's appellate courts have also stated that a "claimant must show by evidence, opinion, or otherwise that the stress, strain or exertion required by his or her occupation led to the resulting injury or disability." Allen v. Industrial Comm'n, 729 P.2d 15 (Utah 1986).

² The ALJ incorrectly referenced Utah Code Ann. §35-2-107 (1991) in his analysis which provides:

For purposes of this chapter, a compensable occupational disease is defined as any disease or illness which arises out of and in the course of employment and is medically caused or aggravated by employment.

Id. However, the application of the 1991 version of this statute is harmless error since, by its terms, this statute requires an injured worker to show substantially less by way of her burden of proof.

STATEMENT OF THE CASE

Nature of the Case

This case presents a question of whether Ms. Giles is entitled to worker's compensation benefits from various defendants, in particular, TAD Technical Services Corporation and its workers' compensation carrier, Liberty Mutual Insurance. She files an appeal from the Utah Labor Commission's Order Denying Motion for Review and Order Denying Motion for Reconsideration.

Course of the Proceedings

With respect to the legal proceedings Ms. Giles has filed against TAD Technical Services Corporation (also known as "Adecco") and/or Liberty Mutual Insurance Company, the following course of events have ensued:

On December 27, 2000 Ms. Giles filed an Application for Hearing seeking worker's compensation benefits from Oakridge Country Club and the Worker's Compensation Fund. See R., 96-117. Ms. Giles claimed "chemically induced porphyria" as a result of exposure to "numerous toxic fumes and materials" during the course of her employment with this employer from May 1991 to December 1991.³ See R., 98.

³ A prior action was filed on May 30, 1992 against Oakridge Country Club and/or the Worker's Compensation Fund for exposure to chlorine gas on September 7, 1991. See R., 1-95. That case, Case No. 92-693 resulted in a resolution by way of settlement agreement.

On that same date, Ms. Giles filed a motion with the Labor Commission requesting that an administrative law judge with no ties to the Labor Commission be assigned to hear this occupational disease case. See R., 96. Her request stemmed from her belief that a Commission ALJ would not fairly adjudicate her claim due to a previous result she obtained in her prior workers' compensation case.

On February 22, 2001, Administrative Law Judge Richard LaJeunesse denied her motion. Judge La Jeunesse stated: "The Labor Commission is the only agency that has jurisdiction to hear workers compensation cases. Therefore, it is not possible to even entertain your request that a judge outside the Labor Commission hear your case." See R., 121.

In a letter dated March 8, 2001 Ms. Giles requested joinder of TAD and its insurer, Liberty Mutual Insurance, to this occupational disease claim. (Collectively, "TAD"). See R., 133. She did so in an attempt to obtain possible apportionment attributable to TAD under what she believed was the applicable statute -- Utah Code Ann. § 35-2-105 (1991).⁴

On May 14, 2001, the Labor Commission sent an Amended Request for Answer to TAD and Liberty Mutual. See R., 195. On June 8, 2001 TAD filed an Answer and a Motion for Summary Judgment. See R., 340-70. In

⁴ As noted *infra*, the applicable statute appropriate to her claim against TAD is Utah Code Ann. § 35-2-14 (1990).

the Motion for Summary Judgment TAD asserted: (1) Ms. Giles failed to meet certain statute of limitation requirements with respect to the filing of her claim; (2) Ms. Giles claim fails for lack of medical evidence to support her claim against TAD; and, (3) the last injurious exposure rule of section 35-2-14 (1990) bars all liability against TAD. See id. Thereafter, Ms. Giles filed a response. See R., 375-85.

In a letter dated March 8, 2001, Ms. Giles submitted a request for reconsideration of the ALJ's denial of an independent ALJ to hear her case. See R., 129. On June 11, 2001, the Labor Commission issued an Order Denying Reconsideration of an independent ALJ. See R., 373. On July 13, 2001, Petitioner filed a Petition for Review with the Utah Court of Appeals. See R., 416-17.

On July 18, 2001, TAD filed a reply memorandum in support of its motion for summary judgment. R., 421-34.

On July 23, 2001, TAD filed a Motion for Summary Dismissal with the Utah Court of Appeals. See R., 450-76. The Court of Appeals issued a decision on December 6, 2001 ruling that because there was no final order, Ms. Giles' appeal was barred for lack of jurisdiction. See R., 686-87. Her petition for certiorari with the Utah Supreme Court was denied. See R., 702.

On June 6, 2002, Administrative Law Judge La Jeunesse issued his Ruling on Motions for Summary Judgment and Motions to Dismiss (the “Order”). See R., 720-35. In the Order, the ALJ granted TAD’s summary judgment motion, ruling that Ms. Giles failed in her burden of establishing medical causation. The ALJ’s Order did not address the other grounds raised in TAD’s Motion for Summary Judgment.

On July 8, 2002, Ms. Giles filed a Motion for Review. TAD filed a response on July 25, 2002. See R., 851-68. On August 30, 2002, Ms. Giles filed an additional Memorandum in Support of the Motion for Review. See R., 884.

On May 1, 2003 the Commission entered its Order Denying Motion for Review. See R., 1030-36. The Commission affirmed the ALJ’s position with regard to TAD’s liability, ruling that Ms. Giles was unable to produce evidence that her work at TAD exposed her to chemicals that caused or contributed to her porphyria.

On May 21, 2003, Ms. Giles filed a Request for Reconsideration. See R., 1037-1120. TAD filed a response to this motion on June 3, 2003. See R., 1129-38. Petitioner filed her response on June 16, 2003. See R., 1149-69. On July 16, 2003 the Commission entered its Order Denying Request for Reconsideration. See R., 1231-35.

On July 16, 2003 Ms. Giles filed a Petition for Review. See R., 1236-37. She filed an Amended Petition for Review on July 23, 2003. See R., 1239-40.

On August 7, 2003 Ms. Giles filed a Docketing Statement.

On August 27, 2003 Ms. Giles filed a Motion to Direct the Labor Commission to Supplement the Record Index and Motion to Stay the Filing Deadline for Appellant's Brief Until the Record is Complete⁵. On September 26, 2003 the Utah Court of Appeals issued an Order on this motion.

On November 6, 2003, the Utah Labor Commission entered a Briefing Order.

On November 21, 2003 Ms. Giles filed a Memorandum Regarding Supplementation of the Record. On December 2, 2003 TAD filed a response to this motion.

On February 19, 2004 the Commission issued its Determination Regarding Giles' Request to Supplement Record.

On March 3, 2004 Ms. Giles filed a Motion Requesting Court of Appeals to Review the Labor Commissions Determination Regarding Record and Motion to Stay the Filing Deadline for Appellant's Brief Until Review is Completed and Issues Regarding Record are Resolved. TAD filed a response

⁵Citations to the record are not available for these ensuing events.

to this motion on March 8, 2004. Ms. Giles filed a reply on March 18, 2004. On March 22, 2004, the Court of Appeals issued its Order denying Ms. Giles motion and set a 30-day appellate briefing schedule for April 22, 2004.⁶

Ms. Giles' brief was submitted to the Court of Appeals on May 21, 2004.

Statement of Facts

Ms. Giles worked as a secretary for TAD from September 1985 to October of 1990. See R., 354. She believes that during this employment she was exposed to multiple toxic fumes and substances contributing to her porphyria. She cannot recall with any certainty the substances to which she might have been exposed, the length of exposure, or the quantity of exposure.

Ms. Giles next began working for Oakridge Country Club beginning around June 1, 1991 to December 19th of that year.

On about June 9, 1992 Ms. Giles filed an Application for Hearing claiming injury on September 7, 1991 at Oakridge which she described as "chlorine gas exposure." See R., 1-95. A hearing on that case was held on January 4, 1993. See R., 36. The ALJ ruled that Ms. Giles did not meet

⁶ Ms. Giles has filed a plethora of other motions which are not referenced in this brief as TAD does not believe they are relevant for purposes of this appeal.

her burden of proof and denied her claim. See id. Petitioner filed a Motion for Review and Motion for Reconsideration which were both denied. See R., 50-54. She sought review with the Utah Court of Appeals.

In the meantime, Ms. Giles continued to seek a medical diagnosis of her alleged condition. On January 5, 1995 Dr. Baker diagnosed her injury as “chemically acquired or chemically induced porphyria” from exposure to toxic fumes at Oakridge. See R., 367-69. Dr. Baker described this condition as follows:

The porphyrias are a group of diseases of heme synthesis in which the over production of prophyrian compounds result from deficient enzyme activity in the biosynthetic pathway of heme...

Without attempting to separately describe each different porphyria, general symptoms of the acute attack may include abdominal pain... nausea, vomiting,...diarrhea. Neurological symptoms... may include peripheral neuropathy, weakness, ... sensory disorder, possible respiratory problems, hallucinations, confusion, depression, sometimes even seizures.

In summary, then, Glenda Giles has developed porphyria as a result of exposure to toxic materials at work at a country club. In addition to be (sic) exposed to chlorine, she was exposed to extensive materials in remodeling including carpeting. She did notice in this area and she consistently better away from this area.

Tests at the Mayo clinic do indicate that she does have porphyria. It is highly unlikely that she had this previously as she does have a triple enzyme defect, and the hereditary forms of porphyria usually will have one enzyme defect.

R., 367-69.

Oakridge continued to dispute liability; however, a compromise settlement was eventually reached and was approved by the Labor Commission. Under this settlement, Ms. Giles is entitled to receive lifetime benefits from the Employers' Reinsurance Fund ("ERF") based upon her claim of being permanently and totally disabled as a result of her claimed exposure on September 7, 1991. See R., 360.

On December 27, 2000 Ms. Giles filed a second Application for Hearing, the present action, seeking worker's compensation benefits from Oakridge Country Club and the Worker's Compensation Fund. See R., 98. This second action was based on the same condition, porphyria, that served as the basis of her first claim under the Workers' Compensation Act. Ms. Giles has claimed to have contracted "chemically induced porphyria" as a result of exposure to "numerous toxic fumes and materials" during the course of her employ with this employer from May 1991 to December 1991. See id. Despite the fact that she is already receiving permanent total disability benefits from ERF, Ms. Giles is claiming that she is, somehow, entitled to yet additional permanent total disability benefits as a result of her claimed porphyria.

Ms. Giles requested joinder of TAD and its insurer, Liberty Mutual Insurance, to this occupational disease claim; however, Ms. Giles did not submit any evidence of exposure to substances at TAD that caused or contributed to her porphyria. See R., 133.

Ms. Giles also requested the Labor Commission to assign an ALJ to her case who was independent of any Labor Commission ties. See R., 96. That request was denied by the ALJ, and later affirmed by the Commission. Although she appealed this matter to the Utah Court of Appeals, that review was denied given the lack of a final order.

Ms. Giles' case against TAD was eventually decided by way of Summary Judgment by Administrative Law Judge La Jeunesse. The ALJ ruled that because Ms. Giles did not meet her burden of medical causation, she had failed to meet her burden of proof. The ALJ ruled:

Ms. Giles admitted that the identity and nature of her exposure to any porphyric substances while employed at Adecco remained conjectural as to the nature, type, time, and place of any such exposure. At best, Ms. Giles can only express her belief as to the type of substance her employment at Adecco exposed her to, and admitted the impossibility of identifying with any certainty the presumed toxic materials or any details concerning the alleged exposures. Ms. Giles also conceded that [she] did not know to what extent her exposures while employed by Adecco affected, contributed, predisposed, and/or caused her porphyria.

Ms. Giles admitted that her principal case was against Oakridge, but she joined Adecco as a hedge against

apportionment under the Occupational Disease statute. Ms. Giles essentially conceded that proof of the claim fell beyond her means and left it to the Labor Commission to deal with apportionment if relevant. Since Ms. Giles lacked a means to prove by preponderance of the evidence that her porphyria arose out of and in the course of her employment with Adecco, her claim must be dismissed.

R., 720-35.

The Commission affirmed the ALJ's ruling on the same grounds. The issue of medical causation being dispositive, neither the ALJ nor the Commission ruled on the other grounds for dismissal raised in TAD's Motion for Summary Judgment. See R., 1030-36.

Ms. Giles has consistently reiterated that she does not know all of the chemicals and fumes to which she might have been exposed while in TAD's employ. Ms. Giles has speculated as to such substances in her Response to Memorandum in Support of Respondent Adecco's Motion for Summary Judgment, but has stated that she cannot recall the substances to which she might have been exposed at TAD, the length of exposure, the dates of exposure, the quantity of fumes to which she might have been exposed, the source of each fume, and the identity of the toxic materials.

SUMMARY OF THE ARGUMENT

Because Ms. Giles claims exposure to toxic substances in the course of employment with TAD which employment ended in 1990, the 1990 version of Utah law applies in this case. Under the applicable statute, Utah Code Ann. § 35-2-14 (1990), no apportionment is allowed against TAD since Oakridge was the last employer during the period of last injurious exposure.

However, as the Commission correctly ruled in its Order Denying Motion for Review, Ms. Giles has not submitted any medical evidence showing exposure to toxic substances during the course of her employment with TAD. Indeed, she has admitted in several instances that she cannot recall the times, or places, or even the names of the substances to which she was allegedly exposed. Certainly, no employer can defend itself from such a vague and unsubstantiated claim. Thus, the Commission correctly denied her claim against TAD for lack of medical causation.

ARGUMENT⁷

MS. GILES FAILED TO MEET HER BURDEN OF PROVING MEDICAL CAUSATION

Ms. Giles submits that the Commission incorrectly granted TAD's Motion for Summary Judgment.⁸ Her brief provides little by way of actual argument to substantiate this point. Nonetheless, TAD asserts that the ALJ and the Commission correctly denied benefits to Ms. Giles for her alleged occupational disease against TAD given her failure to submit medical evidence attributing her porphyria to her employment with TAD.

The Commission began its analysis by stating the correct legal standard: summary judgment may be granted only when no genuine issues

⁷TAD addresses only those legally relevant and factually supported issues that directly pertain to the appeal against TAD.

Ms. Giles also makes allegations of bias against the ALJ, the Commission and the adjudication process. These assertions are simply unfounded and not supported by substantial evidence. In any event, she has failed to marshal the evidence on this matter, and on most issues raised in her brief, as required by law.

⁸ She spends much time in point IV of her brief asserting why TAD's Motion for Summary Judgment was not correctly considered under 12(b) of the Utah Rules of Civil Procedure. However, section 63-46b-1(4)(b) states that the court may grant a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively of the Utah Rules of Civil Procedure, are met. Given that TAD filed a Motion for Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure, there was no need for the court to consider Rule 12(b), and the defenses raised in that rule, as a basis for its ruling.

of material fact exist and the movant is entitled to judgment as a matter of law. See Utah R. Civ. P. 56; Utah Code Ann. 63-46b-1(4); Harper v. Summit County, 963 P.2d 768 (Utah Ct. App. 1998). The Commission and ALJ both agreed, as does TAD, that even when considered in a light most favorable to Ms. Giles, Ms. Giles has failed to establish a genuine issue of material fact regarding TAD's liability in this matter. She provides no challenge to this point on appeal.

Turning to whether TAD was entitled to judgment as a matter of law, the ALJ and Commission both ruled that Ms. Giles did not submit any evidence with her Application for Hearing to establish, by a preponderance of evidence, that her work at TAD during the stated period exposed her to chemicals that medically caused or contributed to her diagnosed porphyria. The ALJ stated on this point:

Utah Code Ann. § 35-2-107 (1991) provided that:

For purposes of this chapter, a compensable occupational disease is defined as any disease or illness which arises out of and in the course of employment and is medically caused or aggravated by that employment.

Ms. Giles as the petitioner in the present matter carried the burden to prove by a preponderance of the evidence that her porphyria arose out of and in the course of her employment with Adecco. [see gen: Ashcroft v. The Industrial Commission of Utah, 855 P.2d 267, 269 (Ut App. 1993) (petitioner's burden of proof by preponderance of the evidence)]. Ms. Giles also bore

the burden to prove by a preponderance of the evidence that her employment at Adecco medically caused her porphyria.

The medical evidence produced by Ms. Giles to date in this case, and taken in the light most favorable to Ms. Giles, established that she developed porphyria as a result of exposure to toxic materials while at work for Oakridge and not from any prior industrial exposure. Accordingly, Ms. Giles' own medical evidence excluded Adecco from any liability for Ms. Giles' porphyria. [see gen: Stevenson v. The Industrial Commission of Utah, 641 P.2d 117 (Utah 1982)].

Ms. Giles admitted that the identity and nature of her exposure to any porphyric substances while employed at Adecco remained conjectural as to the nature, type, time, and place of any such exposure. At best, Ms. Giles can only express her belief as to the type of substance her employment at Adecco exposed her to, and admitted the impossibility of identifying with any certainty the presumed toxic materials or any details concerning the alleged exposures. Ms. Giles also conceded that [she] did not know to what extent her exposures while employed by Adecco affected, contributed, predisposed, and/or caused her porphyria.

Ms. Giles admitted that her principal case [was] against Oakridge, but she joined Adecco as a hedge against apportionment under the Occupational Disease statute. Ms. Giles essentially conceded that proof of the claim fell beyond her means and left it to the Labor Commission to deal with apportionment if relevant. Since Ms. Giles lacked a means to prove by preponderance of the evidence that her porphyria arose out of and in the course of her employment with Adecco her claim must be dismissed.

R., 733.

Although the ALJ incorrectly referenced Utah Code Ann. § 35-2-107 (1991) as the applicable statute, rather than Utah Code Ann. § 35-2-27(28)

(1990), that reference is essentially harmless error since the ALJ and Commission found that even under this more lenient statute, the claimant failed in her burden of medical causation. Certainly, if the Commission and ALJ had properly applied Utah Code Ann. § 35-2-27(28) (1990) to this case, Ms. Giles would have been required to show not only that the claimed disease arose as a natural incident to exposure occasioned by employment (i.e., the medical causation standard),⁹ but also, the following six requirements:

- (1) a direct causal connection between the conditions under which the work is performed and the disease or injury to health;
- (2) the disease or injury to health can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the employment;
- (3) the disease or injury to health can be fairly traced to the employment as to the proximate cause;
- (4) the disease or injury to health is not of a character to which the employee may have had substantial exposure outside of the employment;
- (5) the disease or injury to health is incidental to the character of the business and not independent of the relation of the employer and employee; and

⁹ This is akin to the arising out of and in the course of employment requirement found in the 1991 statute and its successors. Historically, and presently, the arising out of and in the course of employment requirement in the Workers' Compensation and Occupational Disease Acts encompass the elements of medical and legal causation.

- (6) the disease or injury to health must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before discovery.

Utah Code Ann. §35-2-27(28) (1990).

Utah's appellate courts have interpreting the arising out of requirement in this statute and its successors, to require proof of medical causation. This requires that a "claimant . . . show by evidence, opinion, or otherwise that the stress, strain or exertion required by his or her occupation led to the resulting injury or disability." Allen v. Industrial Comm'n, 729 P.2d 15 (Utah 1986). Absent such evidence, the claimant's case fails.

Ms. Giles has not met the necessary statutory and case law requirements to establish a medical causal connection between her porphyria and her work at TAD. The evidence in this case reveals that Ms. Giles' claimed porphyria resulted from, if anything, her exposure to substances at Oakridge Country Club – for which she is already receiving permanent total disability benefits.¹⁰ On January 5, 1995, Dr. Gordon Baker indicated that Petitioner "was in good health until she began working

¹⁰In this regard, Respondents herein submit that Ms. Giles cannot be more permanently and totally disabled as a result of her present condition. Rather, she can claim entitlement only once to permanent total disability benefits.

at the Oakridge Country Club.” See R., 111-12. Dr. Baker also indicated that “Glenda Giles has developed porphyria as a result of exposure to toxic materials at work at a country club.” See id. Dr. Baker states that:

Tests at the Mayo Clinic do indicate she does have porphyria. It is highly unlikely that she had this previously as she does have a triple enzyme defect, and the hereditary forms of porphyria will have one enzyme defect.

Id.

Most significantly, by her own admission Ms. Giles does not have any evidence of exposure to any one particular toxic fume or material while employed by TAD. Rather, the evidence she presented supports the position that she was exposed to noxious chemicals in September 1991. See, e.g. R., 7-53, 80. During this period, she was employed by Oakridge Country Club.

Additionally, Ms. Giles explicitly stated on several occasions that she has no evidence showing exposure to toxic substances during the course of her employment at TAD. In her responses to TAD’s Interrogatories she stated as follows:

21. Please identify each and every toxic fume you claim you were exposed to during your employment with Adecco. . .

[Answer:] These exposures occurred eleven to sixteen years ago, and it is impossible for Petitioner, at this late date, to compile a list of each exposure; on what dates or dates they

occurred; the length of time of exposure; the quantity of fume exposed to; the source or sources of each fume; and, the precise location of each exposure to such fume. Petitioner was exposed to toxic fumes on a daily basis, but has no way of knowing the identity of all the toxic materials she was exposed to. . . . Petitioner did not work with any of the toxic substances.

R., at 433 (Emphasis added.). She has affirmed this position similarly in other pleadings to the Labor Commission. See, e.g. R., 375-85, 398-08.

Because Petitioner has failed to submit any evidence to support her claim against TAD, she has not met her burden of proof. Accordingly, these Respondents request this court to affirm the Commission's ruling and dismiss her claim with prejudice.¹¹

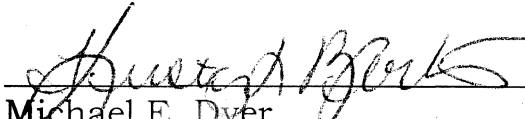
¹¹In any event, even if Ms. Giles could meet her burden of medical causation against TAD, because §35-2-14 (1990) does not permit apportionment against former employers, TAD has no liability in this instance.

CONCLUSION

The Commission's Order Denying Motion for Review was properly entered in this case. Not only does the applicable law disallow apportionment against TAD, but also, Ms. Giles has failed in her initial burden to show that her porphyria is medically connected to her employment with TAD.

Respectfully submitted this 10th June, 2004.

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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing document were mailed, first class, postage prepaid on the 10th day of June, 2004, to:

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